Supreme Court, U.S.
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No.

In The Supreme Court of the United States

October Term, 1996

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT SHOULD ADOPT A BRIGHT-LINE RULE DISQUALIFYING A TRIAL JUDGE FROM PASSING UPON THE FAIRNESS OF A CLASS ACTION SETTLEMENT WHERE THAT JUDGE HAS BEEN INVOLVED IN THE UNDERLYING SETTLEMENT NEGOTIATIONS?

II.

WHETHER A CLASS ACTION IS PROPERLY CERTIFIED AS A MANDATORY, NON-OPT-OUT PROCEEDING WHERE THAT PROCEEDING SEEKS TO RESOLVE TORT CLAIMS FOR DAMAGES?

PARTIES TO THE PROCEEDING

THE PETITIONERS: Petitioners Flanagan and Middleton are merchant seaman who were exposed to Fibreboard's asbestos-containing products during their sailing careers. They objected to the Global Settlement Agreement and were granted leave to intervene in the proceedings. In the underlying proceedings they were sometimes referred to as the "Maritime Claimants" or "Maritime Intervenors".

THE RESPONDENTS: The caption under which this Petition is filed lists the other parties to the underlying *Ahearn* v. *Fibreboard* litigation out of which this Petition arises.

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REPORTED OPINIONS AND ORDERS

The non-opt-out, Global Settlement Agreement being challenged was approved by the district court in *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) (dated July 27, 1995) [A-135].

A divided panel of the Fifth Circuit Court of Appeals affirmed the trial court *sub nom. In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) [A-4].[1]

Rehearing *en banc* was denied, *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996) (November 26, 1996) [A-1]. Rehearing by the original panel was denied without comment, *In re Asbestos Litigation*, 1996 U.S. App. LEXIS 33548 (5th Cir., December 3, 1996) (unpublished) [A-187].

These decisions are included in the separately-bound Appendix to this Petition at the indicated pages.

STATEMENT OF JURISDICTION

A. Jurisdiction In This Court Of Last Resort

Pursuant to Rule 14(e), Petitioners state that jurisdiction lies with this Court by virtue of the following:

(i) date that judgment or order sought to be reviewed was entered:

The court of appeals issued its slip opinion on July 26, 1996 (*In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) [A-4].

(ii) Date of orders respecting rehearing:

The court of appeals entered judgment denying rehearing *en banc* on November 26, 1996 [A-1]. The original panel denied rehearing on December 3, 1996 [A-187].

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[1] **References herein to the Fifth Circuit's decision will be in the style of "Maj., 90 F.3d at ___", or "Dissent, 90 F.3d at ___", followed by reference to the separately-bound Appendix hereto "[A-___]".**

This petition is thus timely in that it is filed with Clerk within 90 days after the denial of rehearing by the court of appeals. *See* Rule 13.3.

(iii) Not applicable.

(iv) statutory provision believed to confer on the Court jurisdiction to review on a writ of certiorari the judgment or order in question:

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

Petitioners Flanagan and Middleton became parties to the underlying civil case of *Ahearn* v. *Fibreboard* via order dated June 28, 1994, granting them leave to intervene.

(v) Not applicable.

B. Jurisdiction In The District Court

The Class Action Complaint filed in the district court alleged subject-matter jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES PRIMARILY RELIED UPON

The following provisions primarily relied upon are set forth in full in the Appendix:

Fed. R. Civ. P. 23 [A-224–A-227]
28 U.S.C. § 455 [A-221–A-223]

PREFACE

The need to rectify occurs when breakdown results. It is a legal breakdown that is the tragedy of the majority opinion by

the court below. The quest for correction is the linchpin of American jurisprudence.

The sole dissenter of this case below stated astutely, "[T]his case is an affront to the integrity of the judicial system." Dissent, 90 F.3d at 994 [A-61]. The integrity of our standard of justice in the United States is often tested. Inherent if not inalienable personal rights form the cornerstone of American citizenry. The right of redress within the code of uniformity is a mainstay ingredient of that cornerstone. This case does not test out because it corrodes that cornerstone by the fostering of judicial legislation. No case of greater magnitude, no case of higher profile; no case of greater forfeiture has ever been conjured.

Now provided is an opportunity for this Court to address the issues of the case as those issues impact upon constitutional guarantees of due process as well as the maintaining of the judicial process that has come to be heralded throughout the world in standing for rights under the law. As it now stands, this is an abominable case that blows like an ill wind of gale force extinguishing the light of freedom that is flamed by the mighty power of the Bill of Rights, the Constitution and the Magna Carta. The right to opt out of a class action for settlement of damages was beyond the reach of challenge before this case was brewed. In the wake of this case, those very rights become flotsam, jetsam and lagan, cast off into the relentless sea of no return.

The right to a fair and impartial adjudication of all issues that underpin a judicial hearing is undeniably fundamental to our judicial system. Yet that very concept is eroded by the opinion below. The key to unlock this travesty indeed is certiorari.

STATEMENT OF THE CASE

A. Fibreboard Corporation — The Tortfeasor

Fibreboard Corporation was a manufacturer of asbestos products. Its asbestos products went into the market from 1920 until 1971. 90 F.3d at 968 [A-5].

Fibreboard was first sued in 1967 for an asbestos-related liability. Like other companies faced with enormous asbestos-related liabilities, Fibreboard looked to its insurers to pick up the tab. Those insurers included Continental Casualty Company and Pacific Indemnity Company.

Disputes concerning the insurers' liability to Fibreboard under the relevant insurance policies resulted in litigation initiated in the California Superior Court in 1979. Fibreboard prevailed in the California trial court.

B. Global Negotiations

Hopeful of getting out of the asbestos-litigation business for good, in 1990 Fibreboard commenced negotiations with a hand-picked group of plaintiff's attorneys.

Fibreboard and the plaintiffs' "counsel without portfolio" came close to agreement in November 1991 on a global settlement. That unconsummated deal would have been structured as an opt-out settlement.

Fibreboard tried to jump start the negotiations again in early 1992, still talking in terms of an opt-out.

C. The Assignment Settlements

Fibreboard, short of ready cash but potentially rich in insurance coverage, in late 1990 embarked on a program of settling asbestos claims with plaintiffs' attorneys utilizing the unusual currency of assignments of Fibreboard's rights to coverage under its insurance policies.

The assignment settlements were most generous in the dollar amounts they purported to grant to injured asbestos claimants. Continental objected to all such settlements, taking the position that Fibreboard was essentially "giving away the store", using Continental's money.

D. The Assignment Litigation In Tyler

On January 11, 1993, Fibreboard filed a Complaint for Declaratory Relief against Continental Casualty Co. in the Eastern District of Texas, seeking to validate the propriety of its assignment

settlements. Another action captioned *Continental Casualty Company* v. *Pacific Indemnity Company and Fibreboard Corporation*, Civil Action No. 6:93 CV 223 (E.D. Texas) was filed on April 13, 1993. The latter case was subsequently consolidated with the former, the resulting litigation being captioned under No. 6:93 CV 11. The parties before the district court in the Assignment Litigation were, then, Fibreboard and the two insurance companies, Pacific and Continental. There were no "plaintiffs" or "claimants" before the Court who had been injured by exposure to Fibreboard's asbestos products.

E. Continental Gets Involved — The April 9 Agreement

In early 1993 Continental, jittery over its abysmal track record in the Coverage Case in California, and fearful of an adverse result in the Assignment Litigation pending in Texas, sought to buy its way out of liability for Fibreboard's asbestos-related torts.

On April 9, 1993, Fibreboard and Continental entered into an agreement by which, among other things, Fibreboard gave up its right to negotiate separately with plaintiffs, and by which both parties made a commitment to use their best efforts to effect a global settlement of their respective asbestos-related liabilities.

F. Not The Parties But The Judiciary Scripted The Scenario For The Class-Action Drama

In early 1993, the Assignment Litigation was pending before Judge Parker. The Court suggested the parties meet with Judge Higginbotham to discuss settlement. Several meetings were indeed held before Judge Higginbotham.

At this point, there were at least two important players in the game who were pushing for a non-opt-out settlement. Judge Parker had championed this approach during the meeting at Dolley Madison House in Washington.

Continental was quick to enlist Judge Parker as an ally. In writing to Judge Higginbotham on March 26, Mr. Wachtell, lead counsel for Continental, impugned a Fibreboard proposal that contemplated an "opt-out" class:

> It would call for an "opt-out" class, a structure which, by definition, cannot terminate ongoing litigation involving the parties and is contrary to ***Chief Judge Parker's emphatically stated view that a global settlement herein can and should be accomplished by means of a mandatory non-opt-out class.***

(Emphasis supplied.) In that same letter Mr. Wachtell amplified the assertion:

> . . . Chief Judge Parker informed the parties at a status conference before him on March 10, 1993, that he believes that a global settlement should and can be achieved by the use of a mandatory, "non-opt-out" class action under Fed. R. Civ. P. 23(b)(1)(B).

At no point in the proceedings did Judge Parker disclose the truth of this assertion. Neither would Judge Parker permit Mr. Wachtell to be deposed or called as a witness. Another attorney for Continental, Mr. Koplow, gave sworn testimony that Mr. Wachtell "would not have made it up."

The judiciary, and not the parties, made the crucial decisions concerning the Rule 23 class action no-opt-out structure of the settlement. It was Judge Parker who crafted the substance that framed the issue here. Judge Higginbotham faithfully followed the non-opt-out mandate. Initially, Judge Higginbotham got "very, very angry" with Messrs. Rice and Cox when they essentially refused to respond to the Continental position that it would not consider an opt-out deal.

The judiciary likewise decided that the settlement should be a "futures only" deal.[2] In July of 1993 Judge Higginbotham "made it clear" that a global settlement "ought to be addressed as a future-only global [settlement]". At a meeting in Dallas on or about July 13, 1993, (Koplow Dep. 203) Judge Higginbotham expressed a dual "view" that (1) global should be limited to future claims; (2) that the format should be a mandatory,

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[2] **This is substantiated by sworn testimony given in *Ahearn*. *See, e.g.*, Koplow Deposition 143, 203-206.**

non-opt-out class under Rule 23(b)(1)(B). It was Judge Higginbotham's "clearly expressed view" that the Ness Motley agreement should be the vehicle "to resolve as many of the present cases as possible." This was not the format Continental favored ("we preferred to have everything in one global").

The declaration that the global settlement should not include "present" cases was not Judge Higginbotham's alone. Rather, it appears that there was an ad hoc "shadow committee" of federal judges, acting behind-the-scenes to advance some agenda. As one of Continental's counsel testified[3]:

> I know what I recall Judge Higginbotham saying at the time that he articulated it, and that was that there had been a conversation or conversations by him with a number of other judges, and he had concluded that the appropriate way to move the discussions forward was to take the presents out of any contemplated global resolution.

Mr. Koplow could not recall whether the names of the other judges were mentioned or not.

It is thus undisputed that this controversial "structural issue" (Snyder, Tr. 12/12/94 at 323-324), was decided by the judiciary, and the product was "a futures action only", "*[a]s the Court had requested . . .*" (Emphasis supplied.) Transcript of 8/27/93 at Page 2 [A-193].

G. The Ness Motley Settlements

Before they would go forward with the global settlement upon which Continental and Fibreboard were so intent, counsel Rice and Cox insisted upon settling their entire office inventories, as well as the asbestos inventories of dozens of other affiliated law firms throughout the United States and Canada. The result was the so-called Ness Motley II[4] agreement approved by

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3 Koplow Deposition 74.

4 After April 9, 1993 it will be recalled that Fibreboard and Continental were negotiating directly with plaintiffs' attorneys. The so-called Ness Motley I agreement of December, 1992, which resolved some 20,000 cases, was between Fibreboard only and the Ness Motley plaintiffs.

Judge Parker on August 6, 1993, "a major step in putting all of this together." Ness Motley II settled in excess of 45,000 cases.

There were handsome sums in store for those favored claims which were selected to avoid the spectre of *Ahearn*. The average settlement under Ness Motley II amounts to $ 10-11,000 per case.

H. Appointment Of Class Counsel For A "Futures" Settlement

In disregard of the unavoidable fact that there was no "class" properly before him, on August 11, 1993 Judge Parker entered an Order captioned in the Assignment Litigation, reciting that on August 9 the firm of Ness, Motley, *et al.* had settled its inventory of asbestos cases against Fibreboard by an agreement between Ness, Motley, Fibreboard and Continental Casualty. The Order purported to officially "authorize" Messrs Rice, Cox, Kazan and Wartnick to negotiate "the prospect of a Rule 23 (b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard."

I. The August 26 Negotiations In Tyler

Between August 11 and 26, the parties continued their negotiations toward a non-opt- out global settlement. Judge Parker was actively involved.[5] The court was aware of "bid and ask" prices in negotiation; "he knew what the issues were between the parties".

On August 26 the parties came to Tyler for additional negotiations under Judge Parker's supervision. The negotiations commenced at the courthouse, but did not end there. As a continuation of negotiations in the Courthouse itself, Judge Parker directed that the discussions were to pause until all adjourned to the judge's house. Outside the courthouse counsel boarded vans arranged for by the Court and were taken to the Court's personal residence.

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[5] **Sworn testimony of counsel present substantiates the asserted facts. *See, e.g.*, testimony of class counsel (Wartnick Dep. 194-196, 213-14, Kazan Dep. 130, Koplow Dep. 310, 315).**

The Court essentially ordered a number of counsel to follow him without advising where they were going. Mr. Koplow "regarded it as simply another device to get some more money out of Continental." They arrived at the judge's home at 5:30 to 6:00 P.M., and left between 11:00 P.M. and midnight. Counsel were served hors d'oeuvres and beverages, some of which were alcoholic.

J. The Court Pressured The Parties During The Negotiations

Facts adduced from sworn testimony are to the effect that the expected conduct is that of a detached, impartial mediator. That was missing. The Court "pressured" and verbally "beat up on" the negotiators. Mr. Koplow testified that during the August 26, 1993 negotiations which commenced at the Courthouse, the Court

> proceeded to do his level best to get a resolution of the issue by pressuring people, mainly the insurers, to do better than the billion 5.

Koplow Dep. 305. Fibreboard was similarly "pressured" by the Court. Koplow Dep. 306-307.

The pressure continued after negotiations adjourned to the Court's residence. The Court employed "persuasive tones, imploring all parties not to be inflexible." Sweeney, Page 80. The tenor of the message the Court implored was that

> "this deal can't fail because of any one of the three of you."

Sweeney, Page 80. At the Court's home Koplow testified that the Court "engaged in sort of equal-opportunity beating on everybody"; "The judge made it clear a number of times that we ought to be able to settle the matter . . ."; The failure of the participants to reach a settlement was "of some amount of frustration to the court." Koplow Dep. 311-312.

The "pressure" being exerted was sufficiently strong that

> counsel for the insurers spent a fair amount of time on the judge's porch and out on the judge's

> front lawn avoiding being beaten up for additional dollars.

Koplow Dep. 316.

K. Global Settlement Announced: The August 27, 1993 "Awards Ceremony"

On August 27, 1993, a hearing was held in the Assignment Litigation to announce the global settlement reached at the judge's home. The transcript reads more like an awards ceremony or testimonial dinner for class counsel as well as the Court, rather than adversarial proceedings. Transcript of "Settlement Hearing" [A-192–A-212].

In the course of the oral presentation by counsel, the Court interrupted on several occasions to interpose questions or comments clearly illustrating its participation in and awareness of the substantive underlying negotiations. *See, e.g.*, Transcript Pages 7, 10 [A-198, A-199]. At Page 13 [A-200] the Court spontaneously commented that

> The element that I recall that I think has not been mentioned, ***in the unlikely event of failure to achieve Court approval*** and failure to achieve approval of the — well, or as part of the bilateral agreement, the relation of the funds to Fibreboard's benefit would include the interest.

(Emphasis added.)

A few moments later Mr. Wachtell rose to address the Court and made clear the collective sentiment in the courtroom that the "proposed" settlement was virtually a "done deal":

> And there is, as Your Honor had indicated a correlation between the — that agreement, as I think Mr. Rice has indicated, is essentially intended to exist as a stand-by agreement *in what we all think is the unlikely* —

Page 16 [A-202] (emphasis supplied). At this point Mr. Wachtell, doubtless realizing that he had been too candid, broke off his sentence and attempted to take it back, stammering obsequiously:

> — well, I should not presume. In the event — I don't want to presume on anything. In the event that the

> global agreement should fail final Court approval for any reason, and my partner Mr. Rosen has the language that I think has been discussed between the parties as to the precise relation of the consideration.

Page 16 [A-202].

Remarks put on record at the conclusion to the August 27 hearing (Transcript, Pages 30-31 [A-212]) provide further circumstantial evidence of the Court's involvement. The following remarks bespeak "case closed – deal clinched" to any candid mind:

> MR. WACHTELL: Your Honor, may I just, before you leave the bench, express on behalf of the parties I represent, I think probably on behalf of all parties, a very great appreciation to Your Honor for the effort that went into permitting us to come in to announce this understanding today. . . . I think Your Honor provided the spark for this, the guidance, and got us all together and made us stay with it until this deal could be done, and I want to express my thanks.
>
> THE COURT: Thank you, gentlemen.
>
> MR. SNYDER: Your Honor, for the first time in this proceeding I agree with everything Mr. Wachtell says.
>
> (End of hearing.)

L. Commencement Of The *Ahearn* Class Action

On September 9, 1993, a hearing was held at an undisclosed location in New Orleans commencing at 6:00 P.M. Transcript of Proceedings, September 9, 1993 [A-213–A-220]. This hearing, held without notice to any party which might have registered objection, was orchestrated for the purpose of presenting an unprecedented *fait accompli* in the annals of class action history.

At the September 9 hearing numerous, momentous and unprecedented events were rushed through without the slightest consideration.

That there was no question of whether the weighty motions would be granted is shown by Mr. Wachtell's comment (Page 7

[A-217]) that "I was not planning to address it orally . . .", to which the Court responded:

> I see no reason for you to. *You are not writing on a clean slate here. These matters have been the subject of extensive negotiations between counsel that the Court has participated in.*

(Page 7 [A-217] [emphasis added in each instance]). To similar effect, *see* Transcript of August 27, 1993 at Page 10 [A-198] (referring to "previous conversations and extensive negotiations" between Court and counsel).

The Court closed the September 9 hearing by stating for the record:

> Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than any other that I am familiar with, with England running a close second, has depended on lawyers throughout its entire existence to solve its real problems. I think the work you have performed over the past few weeks, and specifically extremely difficult issues you dealt with in the past few days, is in the highest tradition of the profession. I'm proud of you. I've been pleased to be associated with you.
>
> I think you have all represented your respective clients extremely well. I think it is a significant thing you have done and I commend you. *We will trust in the scholarship, the good judgment and common sense of the ladies and gentlemen on the courts of appeal in the event this comes to their attention.*

(Pages 10-11 [A-219]).

M. Proceedings Below

The *Ahearn* Class Action was filed on September 9, 1993. On October 5, 1993, counsel undersigned appeared on behalf of the maritime claimants improperly included in the "futures" class. On November 19, 1993, counsel moved the court to decertify the class insofar as same encompassed merchant mariners. On

December 7, 1993, the maritime claimants moved the court to disqualify itself. That motion was denied by order dated January 10, 1994. The merchant mariners moved the Court to certify the recusal issue for interlocutory appeal, which motion was ignored. The mariners sought relief from the order denying recusal by Writ of Mandamus. The Fifth Circuit denied the writ, noting that the matter could be addressed upon a direct appeal.

The Fairness Hearing in *Ahearn* commenced on December 12, 1994. The mariners appeared and renewed their motion for disqualification. The Court denied the motion.

To no one's surprise, on July 27, 1995 the District Court approved both the *Ahearn* and *Rudd* settlements.[6] The merchant mariners timely appealed to Court of Appeals for the Fifth Circuit. After briefing and argument before a panel of the Court of Appeals[7], two members of the panel voted to affirm both *Ahearn* and *Rudd*. In a spirited dissent [90 F.3d at 993-1026; A-59-A-134], Judge Jerry E. Smith pointed out the manifold legal infirmities in the Global Settlement.

Rehearing by the original panel[8], as well as rehearing *en banc*, were sought as to the approval of the *Ahearn* Global Settlement. Rehearing *en banc* was denied on November 26, 1996 [*In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996)]. Judge Smith again dissented, joined by five of his colleagues[9], dissented from the denial of rehearing by the entire Fifth Circuit. Noting that five active circuit judges were recused from consideration the grant or denial of *en banc* rehearing and that a sixth had elected not to participate, Judge Smith pointed out that the

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6 In the proceedings below Petitioners Flanagan and Middleton opposed both the *Ahearn* and *Rudd* settlements. In the instant Petition Flanagan and Middleton seek review solely of the Global Settlement approved in the *Ahearn* litigation.

7 Reavley, Davis and Smith, JJ.

8 The panel denied rehearing without comment in an unpublished order on December 3, 1996. *In re Asbestos Litigation*, 1996 U.S. App. LEXIS 33548 (5th Cir., December 3, 1996) (unpublished) [A-187].

9 Garwood, Jolly, Jones, Emilio M. Garza and DeMoss, JJ.

effect was to require not a majority for the *en banc* procedure but "a supermajority of 82% — nine of the eleven participating judges". [A-3] Noting the unprecedented nature of the *Ahearn* settlement, Judge Smith urged that "The issues presented are worthy of consideration beyond the level of circuit panel review." [A-2]

Since the extraordinary supermajority could not be mustered, Judge Smith concluded with the obvious [A-3]:

> [T]he appellants' only recourse, in order to obtain review of the difficult and novel issue presented, is to petition the Supreme Court for writ of certiorari.

The Maritime Intervenors now do just that.

ARGUMENT

A. AMPLE GROUNDS FOR GRANT OF CERTIORARI

Rule 10 of this Court, "although neither controlling nor fully measuring the Court's discretion", suggests what may be appropriate occasions for the grant of certiorari. Petitioners Flanagan and Middleton assert the following grounds for the grant of their Petition:

[a] That in permitting the trial judge, who had substantial participation in the settlement negotiations, to sit at the Fairness Hearing on the class settlement, the Fifth Circuit has "sanctioned such a departure" from the accepted and usual course of judicial proceedings "as to call for an exercise of this Court's supervisory power";

[b] In the underlying litigation, the Court of Appeals for the Fifth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter": the question of whether an opt-out right is constitutionally required in a class action for damages;

[c] That in ratifying the non-opt-out settlement, the Fifth Circuit "has decided an important federal question in a way that conflicts with [a] relevant decision[] of this Court", that question being the opt-out right which this

Court enunciated in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

B. AN EXTRAORDINARILY IMPORTANT CASE

"Regardless of what else one can say about *Ahearn*, . . . no one can fairly accuse it of being an ordinary case." Dissent, 90 F.3d at 1021 [A-122]. "Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment." Dissent, 90 F.3d at 1026 [A-133].

Judge Smith's dissent highlights the precedent-setting importance of *Ahearn*, an importance the majority opinion purposefully ignored:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map[10] for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Dissent, 90 F.3d at 994 [A-62].

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10 That "road map" leads unerringly to the Fifth Circuit, and will — if left unaltered — lend a new meaning to the term "forum shopping" (dare we say "dumping ground"). As every first-year law student knows, "the search for the forum with the most advantageous governing law lies at the very heart of the notion of forum-shopping." *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 794 n.105 (D.C. Cir. 1980).

While the majority panel decision ignores the importance of its holdings, *Ahearn*'s dramatic implications for the world of mass-tort are clear to any thoughtful individual.

C. ESTABLISHING A PRECEDENT FOR A NON-OPT-OUT CLASS SETTLEMENT HAS IMPLICATIONS FAR BEYOND THIS CASE.

The majority was forced to admit that "appellants' arguments challenging the approval of the global settlement are not insubstantial" [Maj., 90 F.3d at 993; A-59], but sought to defuse the force of those arguments by adding that "on the unique facts presented here they do not carry the day.")

The dissent pointed out the error of that conclusion [90 F.3d at 994; A-62]:

> [T]he majority's reliance upon the "unique facts" of this case, see maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts — a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement — likely will become far too common now that the majority has approved of them.

Issuance of this unprecedented decision is tantamount to Pandora's error in opening the lid of her box. The majority opinion suggests, in essence, that "This rule holds only to red-headed Walpoles in pale magenta Buick cars." *Bhandari* v. *First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion, quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]). This suggestion does not withstand the realities of the jurisprudence of *stare decisis* and the common-law method.

As another jurist of the Fifth Circuit has written[11]:

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11 **Higginbotham, J., *The Crisis in Legal Theory and the Revival of Classical Jurisprudence: Text and Precedent in Constitutional Adjudication*, 73 Cornell L. Rev. 411, 412-413 (1988).**

> In describing the mechanics of *stare decisis*, it is important to keep in mind that the deciding court cannot fully control the precedential force that its decision will have in the future. That strength is in the main given by the later decisionmaker. Of course, the first decider may write broadly and may even disclaim a holding, but the accepted decisional process makes this effort less than fully effective.

The notion that the pattern of a non-opt-out class settlement, premised upon a unilaterally-defined "limited fund" can be confined to the facts of this case, or even to the asbestos context, is not tenable. This is no more possible than preventing citation of the recent *Castano* decision in other factual settings.[12]

The result-oriented tenor of the panel opinion is troubling, and supports the dissent's charge that the trial and appellate jurists who have upheld the Global Settlement to date are wearing the hat of an elected politician, and not the black gown which is the proper garb of a judge.[13]

Also troubling is the panel majority's failure to acknowledge that its decision plows new ground. As the dissent wrote, this settlement is "the first no-opt-out, mass-tort, settlement-only, future-only class action ever attempted or approved." Dissent, 90 F.3d at 993 [A-60]. This is "a radical extension of the mandatory class action." Dissent, 90 F.3d at 1000 [A-75]. The Panel Opinion creates a "circuit split". Dissent, 90 F.3d at 996-997 [A-67–A-68]. "Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here." *See also* Dissent, 90 F.3d at 1000 [A-77] ("A novel action

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12 *See, e.g.*, "5th Circuit Reverses Historic Castano Tobacco Class Action", *Mealey's Litigation Reports: Breast Implants* (June 13, 1996) (suggesting that the *Castano* decision "could have ramifications for *all types of mass tort litigation* . . ." (Emphasis supplied.)

13 In his concurrence in *Bhandari* v. *First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987), Judge Higginbotham warned that "we must not allow our version of a 'correct' result to deceive us into semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue."

laden with such an extreme potential for abuse certainly demands a close look . . .").

D. A DECISION BY THIS COURT WILL PROMOTE CERTAINTY IN RESULT, PAVING THE WAY FOR LAWFULLY-STRUCTURED SETTLEMENTS.

The majority decision of the court below recites a laundry list of "insurmountable" problems which allegedly precluded any global or mass settlement funded by Continental. Maj., 90 F.3d at 970 [A-9]. But surmountability, like beauty, is in the eye of the beholder. It is clear that Continental's "insistence" upon a non-opt-out settlement was the driving force behind the use of Rule 23(b)(1)(B) for a non-opt-out certification. It is equally clear that this intransigence was fostered by a lack of clarity in the law of mass-tort settlements, such ambiguity giving rise to a "gleam" in Continental's corporate eye. Not law or principle, but rather naked self-interest, asked: *Can we get away with it [a non-opt-out class]?*

Lord Coke's ancient maxim is "The knowne certaintie of the law is the safetie of all." *Frilette* v. *Kimberlin*, 508 F.2d 205, 219 (3d Cir. 1974) (Adams, J., dissenting). *See also Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 240, 90 S.Ct. 1583, 1587 (1970) ("important policy considerations militate in favor of . . . predictability in the law").

This Court has already granted review of the *Georgine* opt-out, asbestos class action settlement. A similar ruling by this Court as to the *Ahearn* non-opt-out program (perhaps issued in concert with the *Georgine* decision) will dispel the uncertainty and pave the way for settlements of the "asbestos mess" — settlements which the participants can enter into with assurance.

Mass-tort litigants, lawyers and judges can all perform their respective roles better if they understand what the ground rules are. Better opt-out deals, or other more narrowly-focused settlements are not going to be crafted if asbestos defendants and other liable parties such as insurers believe that they can secure the proverbial "quick fix" via a non-opt-out class. If the

juridical equivalent of the atom bomb is available in the arsenal of the mass-tort defendant, it is inevitable that the weapon will be deployed. The tyrant of antiquity wished that humanity might have a single neck that he might cut it off. Tort defendants — quite understandably — will harbor a similar hope, and for just as long as a single Court, anywhere in the Union, gives them reason to do so.

Continental's mantra of "total peace — a non-opt-out or nothing" is a bluff, albeit successful thus far. Professor Laurence Tribe has criticized as "a complete myth" the theory propounded by some asbestos defendants that the only alternative to a settlement class action is "an infinite tangle of multi-armed lawsuits." Gotthelf, "Settlement Class Barred in Mass Asbestos Suit", *New Jersey Law Journal* (May 20, 1996) (pointing out that the CCR was settling 97-99% of lawsuits prior to filing of *Georgine*).

All parties to settlement negotiations engage in bluffery and puffery. They constantly pause to reevaluate their positions based upon the known rules and risks. One prominent asbestos defendant is reportedly considering its options in the wake of the *Georgine* and *Ahearn* decisions. "Owens Corning, Law Firms Sign Standstill Pact Pending Settlement Talks", Mealey's Litigation Reports: Asbestos (June 21, 1996). If the class settlements are struck down discussions might result in group settlements with individual plaintiff's law firms. *Id.*

As one insurance company vice-president was quoted as saying, "In the short-term, class actions may be under immense scrutiny and it may cost us more if we have to settle cases individually or in smaller classes. But in the long-run, we may get clearer guidelines on what's acceptable . . ." Schachner, "Insurers Not Surprised by Collapse of Deal; Class-Action Settlement May Offer Lower Legal Costs, But Courts Take a Dim View", *Business Insurance* (May 20, 1996).

The case law in the lower federal courts is in hopeless disarray. This Court is the last, best hope for "clearer guidelines".

E. AN AUTOMATIC PER SE RULE OF RECUSAL IS IMPELLING WHERE THE TRIAL COURT PRESIDES OVER THE CRAFTING OF A CLASS ACTION SETTLEMENT.

It would be a monumental understatement to say that the trial court in this cause most grievously "departed from the accepted and usual course of judicial proceedings", that two members of the Fifth Circuit panel "sanctioned such a departure by a lower court". The bizarre course of conducts cries out "for an exercise of this Court's supervisory power". Rule 10(a). It is no lawful excuse to assert that the judges and lawyers who conjured up this unprecedented settlement were well-intentioned, or were following a vision of some "greater good".[14]

In his dissent, Judge Smith bore witness to the truth of the claim that these Petitioners now bring before this Court:

> Apparently this is simply a case of judges — both trial and appellate — trying too hard to solve the vexing problems posed by unending asbestos litigation. Having certified at least two other high-profile asbestos class actions, then-Chief District Judge Parker was acutely aware of the problems posed by asbestos litigation. ***In the end, he appears to have become too close to both the overall problem and the instant settlement to continue to act in a judicial capacity in this case.***

Dissent, 90 F.3d at 993-94 [A-60–A-61] (emphasis supplied).[15]

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14 The dissent [90 F.3d at 998; A-71] noted as one of the majority opinion's "fundamental errors" the "treating justiciability, due process rights, and certification criteria as mere annoyances to be brushed aside in pursuit of what it believes to be the greater good". *See also United States* v. *Bailey*, 327 F.Supp. 802, 807 (N.D. Ill. 1971) ("Periodically in our history, 'true believers' have urged that their ends justified whatever means were necessary to achieve them . . ."); *United States* v. *Meulener*, 351 F.Supp. 1284, 1286-87 (C.D. Cal. 1972) (in cases of great public concern, "it is easy to succumb to the expediency of the moment and, contrary to the Constitution, adopt the principle that the end justifies the means").

15 As one member of the asbestos defense bar commented, the more prominent asbestos judges "share a weakness for the grand gesture. . . . District judges are people, too. They like to see their names in the paper. Ego's not an irrelevant consideration." Labaton, "Judges Struggle to Control a Caseload Crisis", The New York *Times*, March 10, 1991.

These Petitioners take no relish in challenging a federal judge. Yet it is imperative to stand up and be counted when an unprecedented deal, cutting off the rights of literally hundreds of thousands of persons, ends up — *not* by random draw, but by design — before a judge who actively suggested, and helped to craft, that unprecedented deal. Given the stakes involved in such a case, this Court should hold that where a judge presides over settlement negotiations which affect the rights of absent persons, and where the settlement is one which cannot take effect without the imprimatur of the judiciary, that the settlement judge must step aside in favor of a jurist not subject to possible taint.

In 1935, Justice Harlan Fiske Stone wrote these words[16]:

> I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.

As Judge (and later Justice) Cardozo observed, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by." B. Cardozo, *The Nature of the Judicial Process* 168 (1921). While humanity is a strength in a judge, it must be tempered by a sense of the limitations inherent both in the institution of the trial court and the human being through which the institution acts. In an excess of enthusiasm the best of men may make utterances which would cause a reasonable observer to harbor doubts as to whether he could fairly hear a case. When this happens, it is right and proper for a party concerned to stand up and ask the individual to step aside for the sake of the institution. It has been written:

> The outspoken words of a judge may raise a doubt as to his ability to see both sides. When he comes to meet such questions in actual judgment, his decision may

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16 A. Mason, *Harlan Fiske Stone: Pillar of the Law* 398 (1956).

> illustrate the adage of Erasmus, as they show "how easy the coach capsizes on the side to which it leans."

Putnam, *Recusation*, 9 Cornell L.Q. 1, 9 (1923).

Judge Parker's error lies not in his interest in grappling with the national asbestos problem — not in attempting to craft a settlement of Fibreboard's liabilities. His error lies in **proceeding to sit at the final hearing adjudicating the fairness of that settlement** after having been so heavily involved in structuring that settlement. *See* Dissent, 90 F.3d at 994 [A-61], n. 3 (noting that Judge Parker "was aggressively involved in the settlement", yet "presided at the fairness hearing on the very settlement he had helped to craft.")

The recently-revised Manual for Complex Litigation (3d) (Federal Judicial Center 1995) warns of the dangers of judicial entanglement in the settlement process:

> Nor should settlement efforts be permitted to impair the parties' perception of the assigned judge's fairness and impartiality. ... There is a danger ... that such involvement will affect the parties' confidence in the judge's ability to try the case impartially. For this reason, many judges prefer not to engage in substantive settlement negotiations in cases they are expect to try, particularly if there is to be a bench trial ...

MCL 3d § 23.11 at 167.[17] "To avoid the appearance of partiality, the assigned judge may refer the parties to another judge ... to conduct settlement negotiations." MCL 3d § 23.13.

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17 **There are dangers to judicial participation even in the everyday, non-class-action nonjury case. As one federal judge writes concerning the judicial role in settlement:**

> **I have no hesitation in rolling up my sleeves and going the whole way in an analysis of a jury case. I have some reservations about non-jury cases, but, if asked by counsel to participate, I will do so. You have to be a little more careful, and you have to indicate the possibility that you'll transfer the case to another judge for trial if it becomes apparent that, as a result of the negotiations, you are now prejudiced, or believe one side thinks you're now prejudiced, to the**

(*concluded on page 23*)

MCL 3d § 23.14:

> The judge must guard against the temptation to become an advocate — either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not party to it. Neither the proponents of the settlement nor those who are opposed or absent should be favored.

Speaking specifically of the mass-tort context, the Manual states (§ 33.29):

> As in other types of litigation, the assigned judge should be wary of extensive involvement in settlement. Although some judges participate actively in settlement negotiations, others take care to insulate themselves from the negotiations, leaving this activity to a special master or settlement judge; ***where judges have been involved,*** *they have turned over to another judge the responsibility for review and approval of the settlement.*

MCL (3d) at 334 (emphasis supplied), citing *Carlough* v. *Amchem Products, Inc. (a/k/a Georgine* v. *Amchem Products, Inc.)*, No. 93-215 (E.D. Pa. 1993).

There is a well-recognized danger in a trial judge involving himself so deeply in settlement negotiations that an appearance of impropriety is created should it be necessary for that judge to rule upon further contested matters which may arise in the course of a proceeding. Indeed, Judges Higginbotham and Parker both recognized this in the course of the Assignment Litigation. In his first communication to counsel after being

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(*continued from page 22*)

> **point where you couldn't fairly try the case. . . . In any event, I think in a non-jury case you ought to approach settlement discussions like porcupines presumably approach making love, and that is very carefully.**

Will, Merhige and Rubin, J.J., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 211-212 (1976).

"appointed" as "settlement facilitator", Judge Higginbotham wrote to counsel:

> Judge Parker and I met yesterday. He gave me the list of counsel and some of the filed papers in this litigation. We have not discussed any details about possible settlements, and I know little about your litigation. *Chief Judge Parker and I agreed that we would not further discuss this case.* It is my plan to hold all communications with you in confidence and to report to Judge Parker only whether we are making progress. *Judge Parker and I think that he should be insulated hereafter from the settlement proceeding.*

(Emphasis supplied.) For reasons which are unclear, Judge Parker seems not to have perceived the same problem once negotiations on the "global" settlement commenced. At the August 9, 1993 hearing held in the Assignment Litigation, Judge Parker stated:

> The Court determined when the negotiations on the Motley cases began that *it would be inappropriate for the Court to supervise the negotiation because it was in a nonjury scenario and there remained the high potential that the Court would have to resolve both legal and fact issues.* This is purely a prospective settlement class which I would anticipate in the event of successful negotiation would be certified under 23(b)(1)(B). *There will either be an agreement or there will not be an agreement.* Therefore, the Court does not have the same concerns of being involved in the settlement process if involvement would assist counsel or the parties, with the exception of the controversy that exists between Continental and Pacific. *That still has the potential for being litigated, and the Court will not participate in any part of the process relative to that controversy.*

Transcript of August 9, 1993 at 37 (emphasis supplied in each instance). Clearly, the Court recognized the impropriety inherent in a process in which it would sit in judgment in a nonjury setting of a settlement in which it had been involved. It is a testi-

mony to the weaknesses and dangers of a non-adversarial proceeding that the Court failed completely to keep in mind its fiduciary duty to absent class members under Rule 23(e). The Court's statements suggest that it had the settlement of common-garden lawsuits in mind, in which litigants actually before the Court settle or not ("there will either be an agreement or there will not be an agreement"), as suits their whim, and may simply dismiss their cause without judicial scrutiny or approval. The Court failed to recognize that class members have a right to lodge objections to a proposed settlement; that the assigned judge must pass upon those objections before a class settlement may be finalized; and that every class member has a right to have such objections heard and adjudicated by a tribunal free of both actual bias as well as the appearance thereof. In essence, the "trial" of a class action settlement proceeding is "a nonjury scenario", in which there is the *certainty*, and not just the "high potential", that "the Court [will] have to resolve both legal and fact issues" concerning the settlement.

28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> (d) For purposes of this section the following words or phrases shall have the meaning indicated:
>
> (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
>
> * * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Even in the absence of statute, a neutral jurist is a matter of constitutional mandate. As the dissent wrote:

> "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Thus, a litigant is entitled to try his case before a judge who is free of any personal stake in the outcome. *Tumey* v. *Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).
>
> This protection is vitally important in a mandatory class action, for the judge is the only person able to protect class members from an unjust settlement. The class members themselves cannot reject the settlement, and they cannot even reject certification by opting out of the class. They can only present their objections at the fairness hearing and hope the judge will reject the settlement as inadequate. If the judge himself is biased in favor of an unfair settlement, then the class has no protection against it.
>
> ***The intervenors raise serious questions regarding Chief Judge Parker's ability to conduct an impartial fairness hearing.***
>
> * * *
>
> Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and pains-

> taking efforts, probably developed a natural bias in favor of his own work.

Dissent, 90 F.3d at 1013-1014 [A-105–A-106] (emphasis added).

The federal judge's role as the guardian of the class members under Fed. R. Civ. P. 23(e) is simply incompatible with *any* appearance of advocacy or partiality. The class member — the "man in the street" is entitled to a jurist who meets the stringent "Caesar's wife" standard. This Court should lay down a "bright line" rule which, while applauding all attempts for federal judges to help parties to resolve their disputes amicably, precludes a participant in settlement negotiations from sitting at a Rule 23(e) hearing.

F. THE FIFTH CIRCUIT'S RULING FAILS TO HEED THE OPT-OUT RIGHT GUARANTEED BY THIS COURT IN *PHILLIPS PETROLEUM CO.* v. *SHUTTS*.

All counsel stated in the opening statements made at the Fairness Hearing in *Ahearn* that the non-opt-out nature of the Global Settlement was the most difficult legal issue raised by the case. The majority opinion's approval of a non-opt-out class vaunt shadow over substance, and give carte blanche for any attorney to file an action in the Fifth Circuit with the caption "equitable" and unilaterally invoke Rule 23(b)(1)(B).

The majority correctly noted that the "central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos . . ." Maj., 90 F.3d at 976 [A-22]. It subsequent conclusion that no right to opt out need be allowed is a legal *non sequitur*, for it is precisely such claimants for money damages this Court has declared must be afforded the opt out right.

In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985), this Court stated:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an

> opportunity to be heard . . . . The notice should describe the action and the plaintiffs' rights in it. *Additionally, we hold that due process requires that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.*

472 U.S. at 811-812; 105 S.Ct. at 2974 (emphasis added). The Dissent stated the obvious in commenting that "*Shutts* could not be more unambiguous". 90 F.3d at 1002 [A-80]. It is self-evident that the claimants' causes of action for wrongful death or personal injury are classic actions for damages described in *Shutts*. A non-opt-out class action cuts across the grain of due process.

The Dissent noted [90 F.3d at 1002 n. 19; A-80–A-81]:

> Although *Shutts* involved a state court action, the consensus view is that it applies to federal class actions as well. *See Matsushita Elec. Indus. Co.* v. *Epstein*, ___ U.S. ___, ___, 116 S.Ct. 873, 888, 134 L.Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation.")

G. THE FIFTH CIRCUIT'S DECISION CREATES AN INTER-CIRCUIT CONFLICT.

The very first ground for grant of certiorari set forth in this Court's Rule 10(a) is that "**a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]**"

The Fifth Circuit's *Ahearn* decision creates a conflict among the circuits, for the "sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here." Dissent, 90 F.3d at 996 [A-67].

The import of *Shutts* was discussed in *In re Real Estate Title Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). The Third Circuit noted that pursuant to *Phillips Petroleum Co.* v. *Shutts*, where an absent class member has not been given the chance to opt out of an action involving both important injunctive relief and damage claims, the member must "either have minimum contacts with the forum or consent to jurisdiction" to be bound by orders issuing out of the class action court. 869 F.2d at 769. The Third Circuit rejected squarely the contention that imposition of minimum contacts requirement to class action litigation "would wreak havoc" with the class action scheme: "We do not agree with appellees' dire predictions." *Id.* Indeed, the Court observed that the ability of some plaintiffs to "extricate themselves from class action judgments" is "integral to the constitutionality of the class action procedure." *Id.*[18]

Likewise, in *Brown* v. *Ticor Title Insurance Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted in part*, 114 S.Ct. 56, 126 L.Ed.2d 26 (1993), *writ dismissed as improvidently granted*, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994), the Ninth Circuit held that a class action judgment rendered in a Multidistrict Litigation proceeding did not and could not foreclose a class member's right to seek money damages where the claimant had not been afforded notice and the opportunity to opt out. The Ninth Circuit was bound by the rule of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811, n. 3, 105 S.Ct. 2965, 2974 n. 3, 86 L.Ed.2d 628 (1985).

The Dissent calls the Global Settlement's failure to afford an opt-out "raises a red flag", noting that "[e]ven the now-discredited *Georgine* settlement permitted opt-outs." 90 F.3d at 1000 [A-77].

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18 The Ninth Circuit cited approvingly the Third Circuit's similar ruling in *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*. Intervenors believe that the settling parties deliberately avoided filing the Class Action within the MDL-875 docket in Philadelphia in order to avoid this adverse authority.

CONCLUSION

As Chief Justice Marshall stated so long ago in *Marbury* v. *Madison*, 5 U.S. 137, 163, 1 Cranch 137, 2 L.Ed. 60 (1803),

> The government of the United States has been emphatically termed a government of laws, and not of men.

Petitioners urge the Court to restore a modicum of certainty to the settlement of mass-tort cases by accepting review of this case and vacating the unlawful non-opt-out settlement. In the words of the trial judge, this is "what appellate courts are for".[19]

Respectfully submitted,

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19 Gordon Hunter, "Parker Out on a Limb in Asbestos Fight; Beaumont Judge Concedes Hitches in Class Action Plan", *Texas Lawyer* (August 27, 1990) (in response to challenge by counsel as to what authority existed to consolidate all state and federal asbestos cases into one huge federal class action, Judge Parker's reported response was "That's what appellate courts are for.")